Case No. 81-6419

IN THE

SUPREME COURT OF THE UNITED STATES

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MARK MIKENAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

---

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
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ATTORNEYS FOR PETITIONER

Case No.

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## QUESTION PRESENTED

Whether a death sentence based in part upon a jury's recommendation of death violates due process and subjects the death sentenced defendant to cruel and unusual punishment when the jury which recommended the sentence by a seven to five vote heard and considered evidence of nonstatutory aggravating circumstances?

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## OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix. (A1-5)

## JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on November 5, 1981. (A1-5) Petitioner filed a motion for rehearing which was denied on January 28, 1982. (A6-8) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141 Florida Statutes (1975) which is set forth in the appendix. (A17-19)

## STATEMENT OF THE CASE

Petitioner, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida on November 3, 1975. (A10) During the robbery, Petitioner carried a revolver. (R253-254,294-295)(A10) There were no customers in the store, and the lone store clerk was forced into a back room. (TR253-255,294-296)(A10) From a hidden position inside a storeroom, an auxiliary deputy, Gary Barker, observed the robbery. (TR253-255)(A10) Startled by the arrival of a car at the front of the store, Petitioner and his companions attempted to leave through that rear storeroom. (TR255)(A10) Barker confronted the men, identified himself as a law enforcement officer and announced their arrest. (TR255-256)(A10)

At about the same time, Anthony Williams, an off-duty Tampa policeman wearing civilian clothes entered the front door of the store as a customer. (TR256)(A10) Barker advised Williams that a robbery was in progress and asked for help. (TR256)(A10) Petitioner then fired one shot above Barker's head. (TR257-258, 309)(A10) Barker returned one shot. (TR258)(A10) Petitioner and Vito Mikenas ran toward the front door. Barker fired again, killing Vito and wounding Petitioner. (TR258-260)(A10) As Petitioner fell near the front doorway, he fired a shot, killing Anthony Williams. (TR260-262)(A10)

On November 5, 1975, a grand jury indicted Petitioner for the first degree murder of Anthony Williams and the second degree murder of Vito Mikenas under a felony-murder theory. (R1-2) Petitioner pleaded guilty to the first degree murder charge and nolo contendere to the second degree murder, reserving for appeal the legal issue of whether he could be convicted for second degree felony murder. (R46-59) An advisory jury was impaneled pursuant to Section 921.141, Florida Statutes to render a recommendation on which penalty should be imposed for the first degree murder--death or life imprisonment. (TR14-200)

In addition to evidence concerning the circumstances of the crime, the sentencing advisory jury also heard other evidence in aggravation and mitigation. Over Petitioner's objections (R288-290,324,329), the prosecutor presented evidence of Petitioner's past criminal history including arrests and charges which did not result in convictions. (R339,340-344,345, 347,351,360-362,364,365,371-374,375,376) Police officers from Connecticut, New York and Florida testified to adult and juvenile charges against Petitioner for which there were no convictions; outstanding arrest warrants; and general suspicion regarding Petitioner's participation in an unsolved robbery. (ibid.) The prosecution argued all the evidence was relevant to the aggravating circumstance regarding previous conviction for a violent felony provided for in Florida's death penalty statute. §921. 141(5)(b), Fla.Stat. (1975) Petitioner contended that the only evidence admissible was for actual convictions of felonies involving violence. (TR288-290,324,329) In mitigation, a neurosurgeon testified that Petitioner would have had an uncontrollable reflex action at the time he was shot in the back by Officer Barker causing him to fire the shot which killed Williams. (TR404-414) The bullet fragments had entered the spinal canal, placing pressure on the spinal cord and causing a weakness in Petitioner's legs. (ibid.) Petitioner testified that he blacked out when shot and had no recall of firing the shot which killed Williams. (TR421-424)

The jury recommended a death sentence. (R67) Circuit Judge Robert W. Rawlins, Jr., adjudged Petitioner guilty of first degree murder and second degree murder. Petitioner was sentenced to death and life imprisonment. (R72-74) In his findings of fact to support the death sentence, which is required by Florida law, the sentencing judge, in aggravation, found: (1) that Petitioner committed the murder while engaged in a robbery; (2) that Petitioner committed the murder for pecuniary gain; (3)

that Petitioner had a previous conviction for robbery; (4) that the Petitioner created a great risk of death to many persons; (5) that Petitioner committed the murder to avoid arrest; and (6) that Petitioner had a substantial history of prior criminal activity. (R75-76)(A12-13) In mitigation, the sentencing judge found Petitioner's age of 22 years at the time of the crime. (R75-76)(A12)

Petitioner appealed to the Supreme Court of Florida. In a 1978 opinion reported at 367 So.2d 606, that Court remanded Petitioner's case for resentencing, without another advisory jury, because the sentencing judge improperly found a nonstatutory aggravating circumstance--that Petitioner had a substantial history of prior criminal activity. (A9-16) Mikenas v. State, 367 So.2d 606 (Fla.1978)

At his resentencing proceeding, Petitioner requested that a new sentencing advisory jury be impaneled, arguing that the jury which recommended death had, like the judge, considered the evidence of nonstatutory aggravating circumstances. The request was denied. (SR164-167,180-181) Petitioner had proffered an affidavit of a juror from the original proceeding which stated that the improper evidence was considered in aggravation by the jury and that without it, the seven to five vote for a death recommendation could have been different. (SR330)

Petitioner was again resentenced to death (SR184-191), and he appealed. One issue in the appeal was the failure of the trial court to impanel a new sentencing jury. In affirming the death sentence, the Supreme Court of Florida held that a new jury was not necessary because the evidence of Petitioner's criminal history was relevant to rebut the statutory mitigating circumstance of no significant history of prior criminal activity. Mikenas v. State, __So.2d__ (Fla.1981)(Case No. 49,928, opinion filed Nov. 5) On rehearing, Petitioner pointed to the

fact that the mitigating circumstance of no significant history of prior criminal activity was never an issue, and that the Supreme Court of Florida in an earlier decision held that such rebuttal evidence is improperly before a jury when the mitigating circumstance is not urged by a capital defendant. [Maggard v. State, 399 So.2d 973,977-978 (Fla.1981)]. (A6-7) The motion for rehearing was denied.

## REASONS FOR GRANTING THE WRIT

A DEATH SENTENCE BASED IN PART UPON A JURY'S RECOMMENDATION OF DEATH VIOLATES DUE PROCESS AND SUBJECTS THE DEATH SENTENCED DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT WHEN THE JURY WHICH RECOMMENDED THE SENTENCE BY A SEVEN TO FIVE VOTE HEARD AND CONSIDERED EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

Florida's capital sentencing procedures as defined in Section 921.141, Florida Statutes (A17-19) were designed to cure the unbridled discretion in capital sentencing which this Court condemned in Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court of Florida expressly acknowledged the new statutes purpose and deemed the limited, narrowly defined aggravating circumstances to be a critical part of the cure. State v. Dixon, 283 So.2d 1 (1973) In Proffitt v. Florida, 428 U.S. 242 (1976), this Court held that Florida's procedures were facially constitutional because they provided such specific and detailed guidance in the sentencing process. An important and indispensible part of the guidance this Court recognized in Florida's statute is the limitation of aggravating circumstances to those enumerated in the statute. Id.

The upholding of Petitioner's death sentence based upon a jury's recommendation of death which was founded in part upon evidence of nonstatutory aggravating circumstances is a gross misapplication of Florida's procedures. Florida has failed to comply with this Court's mandate that if it "...wishes

to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420,428 (1980) Although facially valid, the statutory procedures were misapplied in Petitioner's case rendering his death sentence unconstitutional. The jury's recommendation was not the product of a channeled and guided process because a nonstatutory aggravating circumstance was injected into the decision.

The prosecution in this case presented as aggravating circumstances, over Petitioner's objections, Petitioner's entire criminal history including outstanding charges for which there was no convictions, cases in which Petitioner was merely a suspect, as well as a prior felony conviction. (TR288-290, 324,329,340-345,347,351,360-362,364,365,371-374,375-376) Petitioner argued that much of this evidence failed to qualify as evidence of statutory aggravating circumstances and was improper. (TR288-290,324,329) However, the evidence was admitted, and the original sentencing judge relied on the evidence, finding as a nonstatutory aggravating circumstance that Petitioner had a significant prior history of criminal activity. (A9-16) Mikenas v. State, 367 So.2d 606 (Fla.1978) Additionally, the sentencing advisory jury also relied upon the evidence as aggravating circumstances in reaching its seven to five decision to recommend a death sentence. (SR330)

On Petitioner's first appeal to the Supreme Court of Florida, the appellate court realized that the sentencing judge relied on a nonstatutory aggravating circumstance and remanded the case for resentencing without a new jury. Id. Petitioner argued in the trial court and again on his second appeal that a new jury was necessary because, like the sentencing judge, it relied on improper, nonstatutory aggravating circumstances in reaching a sentence recommendation. (A1-5) Mikenas v. State,

__So.2d__ (Fla.1981)(Case No. 49,928, opinion filed Nov.5) The Supreme Court of Florida affirmed, holding that a new jury was not necessary because the evidence of Petitioner's criminal history, while improper aggravating evidence, was properly before the jury as evidence to rebut the mitigating circumstance of no significant history of prior criminal activity. Id. However, in reaching this decision, the Florida Court overlooked and failed to apply its earlier decision in Maggard v. State, 399 So.2d 973,977-978 (Fla.1981) where it held that such evidence is improper rebuttal where the defendant has not asserted or placed the mitigating circumstance of no significant criminal history in issue.[1/]

The fact that the jury in Florida's sentencing procedures only makes a recommendation to the judge who imposes sentence does not render the constitutional violation harmless. §921.141(2), Fla.Stat.; State v. Dixon, 283 So.2d 1 (Fla.1973) Both the sentencing trial judge and the Supreme Court of Florida are to give life recommendations great weight. A life recom-

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1/ Petitioner on rehearing, pointed to the Florida Supreme Court's oversight regarding Maggard v. State. (A6-7) In fact, the petition for rehearing quoted the following portions of the transcript where defense counsel indicated that the mitigating circumstance was not being asserted. (A6-7)

> I make a further objection as to the shoplifting charge, which is not a crime of violence, is not a capital-felony, and, therefore, according to the rules, should only be presented in rebuttal, should the defendant claim that he has no significant criminal history. Once a defendant makes that assertion that he has no significant criminal history then evidence of other crimes, crimes other than those of violence or other than capital-felonies, would be admissible to rebut. But until the predicate is laid by the defendant, or the claim is made by the defendant, that he has no prior criminal history, I do not think the evidence of a crime such as shoplifting is properly before the jury.

(TR289-290)

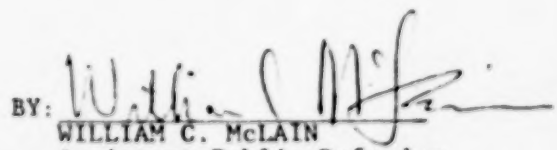
mendation can overridden only if the facts suggesting death as the appropriate penalty are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908,910 (Fla.1975) Consequently, the jury's recommendation was an important factor in determining Petitioner's sentence. And, with only one juror's vote making the difference between a life or death recommendation, it can hardly be said that the improper aggravating evidence made no difference.

Petitioner's death sentence was the product of a material misapplication of Florida's death penalty law. The jury recommendation was tainted by consideration of improper, non-statutory aggravating circumstances thereby destroying the reliability of the sentencing process. Petitioner's sentence is constitutionally infirm in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

## CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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## APPENDIX


| ITEMS: | PAGE NO. |
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| 5. Section 921.141, Florida Statutes (1975) | A17 |

# Supreme Court of Florida

No. 49,928

MARK MIKENAS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 5, 1981]

Adkins, J.

This is the second appeal taken from a sentence of death imposed after a conviction for murder in the first degree. On the first appeal, we affirmed the conviction, but remanded the case to the trial court for resentencing without further deliberations by a jury. Mikenas v. State, 367 So.2d 606 (Fla. 1979). The trial court had improperly considered the fact that defendant had a substantial history of prior criminal activity as an aggravating circumstance.

Upon remand, defendant filed a Motion for Evidentiary Hearing and Advisory Sentence by Jury. The court denied this motion and subsequently sentenced defendant to death. In the findings of fact in support of the death penalty, the court listed the presence of all the aggravating circumstances which were present in relation to the original sentence with the exception of the nonstatutory circumstance of substantial history of prior criminal activity. For mitigating circumstances, the judge listed the age of the defendant at the time of the offense (22) as possibly constituting a mitigating offense.

Defendant raises the following four issues on appeal: the trial court erred by (1) refusing to impanel an advisory jury, (2) failing to consider and weigh evidence of statutory and non-statutory mitigating factors, (3) finding that the murder was committed both for pecuniary gain and in perpetration of a robbery and (4) failing to strike all or part of the presentence investigation. We find merit in none of these arguments and accordingly affirm the sentence.

In our original decision, we specifically remanded for resentencing "without further deliberations by a jury." 367 So.2d at 610. Defendant contends that a contrary procedure is dictated by Elledge v. State, 346 So.2d 998 (Fla. 1977), wherein we set aside a death sentence and remanded for a new sentencing trial because the trial court had considered as a nonstatutory aggravating factor evidence concerning an alleged murder not within the res gestae of the murder for which the defendant was being tried and which had not resulted in a conviction at the time of the trial. However, Elledge is not relevant. In this case, the evidence itself was not improper, only the manner in which it was considered by the court in its findings of fact. It was not improper for the jury or court to consider the evidence of defendant's prior criminal history in relation to the mitigating circumstance it was obviously intended to counter, that is, the lack of a significant history of prior criminal activity.

The situation in the case sub judice is similar to that in Fleming v. State, 374 So.2d 954 (Fla. 1979), wherein we held that the trial court erred in finding an aggravating circumstance. Therein, we also remanded for resentencing by the court without further recommendation from the jury. Similar to the situation here, the error there had occurred in the court's specific findings and was therefore to be corrected by the court rather than the jury.

In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two

psychologists concerning the possibility of defendant's rehabilitation and a minister concerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.

The facts herein are similar to those in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), a death sentence case where we remanded for resentencing because of an apparent noncompliance with guidelines announced in Gardner v. Florida, 430 U.S. 349 (1977). Upon remand, the trial judge refused to take testimony from prison inmate character witnesses. In upholding the trial court's denial of issuance of subpoenae for this purpose, we stated that appellant had been afforded ample opportunity to present evidence in mitigation in the original sentencing proceeding. The same reasoning applies here.

Defendant's third point is equally unavailing. The trial court found that the capital felony was committed while the defendant was engaged in the commission of a robbery and also that it was committed for pecuniary gain. In its finding concerning the "pecuniary gain" circumstance, the court specifically stated that it was considered in conjunction with "robbery" circumstance. This is not contrary to the dictates of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), wherein we held that in all robbery-murders only one of these two aggravating circumstances can be found. We assume that the judge had Provence in mind when he specifically considered these two circumstances in conjunction. The word "conjunction" itself connotes a joining together to form one. While it may have been better practice to omit one of the factors completely in deference to the other, we cannot say that failure to do so is error.

Defendant's last point concerning the presentence investigation report is without merit. The trial court is entitled by Rule 3.710, Florida Rules of Criminal Procedure, to

draw its own conclusion from information in the report in capital cases. Swan v. State, 322 So.2d 485 (Fla. 1975). In accordance with the dictates of Gardner, supra, the defendant was provided an opportunity to rebut.

Accordingly, the sentence of death is hereby affirmed.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Hillsborough County,

J. C. Cheatwood, Judge - Case No. 75-5790 Div. "C"

Judge C. Luckey, Jr., Public Defender for the Thirteenth Judicial Circuit, and Bruce P. Cury, Chief Assistant Public Defender, Tampa, Florida; and Jerry Hill, Public Defender for the Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Jim Smith, Attorney General and Eula Tuttle Mason, Assistant Attorney General, Tampa, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| MARK MIKENAS, | : | |
| Appellant, | : | |
| vs. | : | Case No. 49,928 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

MOTION FOR REHEARING

The Appellant, MARK MIKENAS, through his undersigned attorney, moves this Court to grant rehearing in this case.

As grounds, Appellant states:

1. On page 2 of the slip opinion, Appellant's claim that a new penalty phase jury should have been impaneled for his resentencing was rejected. As a basis, this Court said that evidence of Appellant's criminal record was not improperly considered by the jury because it was offered to counter the lack of a significant history of prior criminal activity rather than to support an aggravating circumstance.

> In this case, the evidence itself was not improper, only the manner in which it was considered by the court in its findings of fact. It was not improper for the jury or court to consider the evidence of defendant's prior criminal history in relation to the mitigating circumstance it was obviously intended to counter, that is, the lack of a significant history of prior criminal activity.

Mikenas v. State, __So.2d__ (Fla.1981)(Case No. 49,928, opinion filed November 5)

2. This Court, in the above ruling, may have overlooked the following facts:

a. The prosecutor in this case specifically offered the criminal record evidence in support of aggravating circumstances, not as rebuttal. (R286-291)

b. Appellant never asserted that the mitigating circumstance of no significant history of prior criminal activity

applied. (R289-290) He never argued that circumstance to the jury. (R472-491) In fact, defense counsel in arguing against the admissibility the evidence in question said,

> I make a further objection as to the shoplifting charge, which is not a crime of violence, is not a capital-felony, and, therefore, according to the rules, should only be presented in rebuttal, should the defendant claim that he has no significant criminal history. Once a defendant makes that assertion that he has no significant criminal history then evidence of other crimes, crimes other than those of violence or other than capital-felonies, would be admissible to rebut. But until the predicate is laid by the defendant, or the claim is made by the defendant, that he has no prior criminal history, I do not think the evidence of a crime such as shoplifting is properly before the jury. (R289-290)

3. This Court has held that evidence of a capital defendant's criminal history is relevant to rebut the mitigating circumstance of no significant history of prior criminal activity but inadmissible when that mitigating circumstance is not in issue. Maggard v. State, 399 So.2d 973,977-978 (Fla.1981). The Maggard holding applies to Appellant's case. The evidence was inadmissible and improperly considered by the jury.

Wherefore, Appellant asks this Court to grant rehearing.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: /s/ W.C. McLain
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Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Robert Landry, Assistant Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 17th day of November, 1981.

/s/ W.C. McLAIN
W.C. McLAIN

WCM:jp

# Supreme Court of Florida

THURSDAY, JANUARY 28, 1982

CORRECTED ORDER

MARK MIKENAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 49,928

Circuit Court No. 75-5790 Div. "C"
(Hillsborough)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carnes
Deputy Clerk

TC
cc: Hon. James F. Taylor, Jr., Cler
Hon. J. C. Cheatwood, Judge
W. C. McLain, Esquire
Robert Landry, Esquire

A8

we are persuaded that the more lenient standard is equally applicable to a wiretap authorization order. We now hold that when information acquired through the interception of communications under the procedure authorized by Section 934.03(2)(c) is used only to establish probable cause, the state need not establish consent through the direct testimony of the consenting party. It follows that the trial judge did not err in denying appellants' motion to disclose the identity of the confidential informant and to produce him for cross-examination by the defense on the issue of consent.

In accordance with the foregoing analysis, the orders entered below upholding the constitutionality of the bookmaking statute and denying appellants' motions are approved, and the convictions appealed from are in all respects affirmed. These cases are remanded to the trial court for proceedings not inconsistent with this opinion.

It is so ordered.

ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

HATCHETT, J., concurs in part and dissents in part with an opinion.

HATCHETT, Justice, concurring in part, dissenting in part.

I agree with the majority that the bookmaking statute is constitutional. *State v. Barnett*, 366 So.2d 411 (Fla.1978). I would remand the case to the trial court for a finding by the trial judge as to whether consent was given by the informant as required by Florida Statute 934.03(2)(c), because *any* interception of a wire or oral communication is unlawful without the required consent.

Mark MIKENAS, Appellant,

v.

STATE of Florida, Appellee.

No. 49928.

Supreme Court of Florida.

Nov. 9, 1978.

Rehearing Denied March 7, 1979.

Defendant was convicted in the Circuit Court, Hillsborough County, Robert W. Rawlins, J., of first-degree murder and second-degree felony-murder, and defendant appealed. The Supreme Court held that: (1) "Person" as used in second-degree felony-murder statute to describe what victims the killing of whom is deemed second-degree felony-murder is not limited to innocent persons killed by one perpetrating or attempting to perpetrate felony, and thus defendant who participated in robbery during which fellow robber was shot by auxiliary deputy sheriff could properly be convicted under such statute, and (2) defendant's prior history of criminal activity was not "aggravating circumstance" to be used in weighing process required when death sentence is imposed.

Convictions affirmed; remanded for resentencing.

Adkins, J., concurred in part and dissented in part with opinion.

1. Criminal Law ⇐1153(1)

Absent showing that trial judge abused his discretion, ruling regarding admission of testimony in criminal proceeding will not be disturbed.

2. Criminal Law ⇐667(1)

Trial court did not err in allowing police officer-victim's police officer-widow, who was at scene at time of robbery and shooting and arrested defendant, to testify from wheelchair in subsequent prosecution for first-degree murder and second-degree felony-murder where trial court gave cautionary instruction to jury that widow's

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physical condition was in no way related to the shooting incident.

3. Judges ⇐49(2)

Remark of trial judge to codefendant prior to penalty proceedings in which defendant was sentenced to death that the codefendant was probably saved from death sentence because he stopped at command of police officer at scene of shooting and because codefendant was unarmed did not require recusation of the judge on basis of bias where the jury, unaware of such remark, recommended death.

4. Homicide ⇐18(1, 5)

"Person," as used in second-degree felony-murder statute to describe what victims the killing of whom is deemed second-degree felony-murder, is not limited to innocent persons killed by one perpetrating or attempting to perpetrate felony, and thus defendant who participated in robbery during which fellow robber was shot by auxiliary deputy sheriff could properly be convicted under such statute. West's F.S.A. § 782.04(3).

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐1147

It is not function of the Supreme Court to cull through what has been listed as aggravating and mitigating circumstances pursuant to statute requiring weighing process when death sentence is imposed, to determine which are proper for consideration and which are not, and then to impose the proper sentence; in accordance with the statute, such culling process must be done by the trial court. West's F.S.A. § 921.141.

6. Criminal Law ⇐986

Defendant's prior history of criminal activity was not aggravating circumstance to be used in weighing process required when death sentence is imposed. West's F.S.A. § 921.141.

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Ellen M. Condon, Temple Terrace, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

We review this case to determine whether the appellant was convicted and sentenced to death for first-degree murder and second-degree felony-murder in accord with statutes and court decisions. We affirm the convictions, but we remand the case to the trial court for resentencing because of improper application of aggravating circumstances. Article V, Section 3(b)(1), Florida Constitution.

On November 3, 1975, the appellant, Mark Mikenas, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida. During the robbery the appellant carried a .38 caliber revolver. There were no customers in the store during the robbery. Upon entering the store, the appellant and his co-felons forced the lone store clerk into a back room of the building. Unknown to the robbers, Gary Barker, an auxiliary deputy sheriff, observed the robbery from a hidden position in the store. When an automobile unexpectedly arrived at the front of the store, appellant and his co-felons tried to exit the store through a back door. Barker, with drawn pistol, stopped them and placed them under arrest.

Seconds later, Anthony Williams, an off-duty Tampa policeman in civilian attire, came into the store through the front door. Barker called to Williams for help and informed him that a robbery was underway. Immediately thereafter, appellant and Barker fired at each other with both missing. Barker later killed Vito and wounded the appellant as they ran towards the front of the store. As appellant was falling to the floor, he shot and killed Anthony Williams, the Tampa police officer. Ann Williams, the wife of Anthony Williams, herself a police officer in uniform, arrested appellant. Barker arrested Rinaldi.

The indictment charged the appellant and Rinaldi, in two counts, with first-degree murder of Anthony Williams and with

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second-degree murder of Vito Mikenas who "was killed by a person or persons other than the person or persons engaged in the perpetration or attempt to perpetrate said robbery . . . ."

The appellant pleaded guilty to murder in the first degree for the death of Anthony Williams and pleaded nolo contendere to the charge of second-degree murder of his brother, Vito. Appellant reserved the right to appeal the applicability of Section 782.04(3), Florida Statutes (1975), the second-degree felony murder statute, to the facts of this case. The judge adjudged appellant guilty, and a jury selected for the sole purpose of recommending sentence, rendered a recommendation of death. The judge sentenced appellant to death.

The appellant contends that the trial judge committed reversible error by (1) abusing his discretion in allowing the deceased police officer's wife to testify from a wheelchair and in refusing to recuse himself; (2) holding that Section 782.04(3), Florida Statutes (1975), the second-degree felony murder statute, applied to the facts of this case; and (3) misapplying the aggravating and mitigating circumstances listed in Section 921.141, Florida Statutes.

I

When Ann Williams, the police officer who arrested appellant and the wife of the deceased police officer, was called as a witness, appellant moved for a continuance because she was in a wheelchair. The motion for continuance was denied. The court did, however, give a cautionary instruction to the jury indicating that the physical condition of Ann Williams was in no way related to the homicide. The court stated during the course of that instruction that "her medical or physical condition is something foreign to and not related in any way to the incident."

[1, 2] We find no error in the trial judge allowing this witness to testify from a wheelchair. The jury understood that the incident on trial was not the reason for her inability to stand. She had ample relevant evidence to present to the jury as to the "triggerman." In the absence of a showing that the trial judge abused his discretion, the ruling will not be disturbed. *Zide v. State*, 212 So.2d 788 (Fla. 3d DCA 1968), cert. denied 394 U.S. 911, 89 S.Ct. 1026, 22 L.Ed.2d 223 (1969). The appellant has failed to make an adequate showing.

[3] The appellant also alleges that the trial judge should have recused himself because prior to the penalty proceedings in this case, while addressing Rinaldi, the trial judge stated:

> Fortunately for you, son, the only thing that probably saved you from a possible death sentence is the fact that when that officer told you to stop, you stopped, and, secondly, that you didn't have the firearm.

These remarks took place while Rinaldi was being sentenced for murder in the second-degree. We find no merit in the appellant's contention that these remarks, made to his co-defendant at sentencing, indicated a bias on the part of the trial judge regarding the sentence that appellant should receive. The jury, unaware of this remark, recommended death.

II

[4] Section 782.04(3), Florida Statutes (1975), reads as follows:

> When *a person is killed* in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084. [Emphasis added.]

The appellant contends that Section 782.04(3), Florida Statutes (1975) is inapplicable

All

to the facts of his case. He, in effect, says that it is clear from the evidence that Barker, the auxiliary deputy sheriff, shot and killed Vito. If this is true, he says, and Vito is a co-perpetrator, no one can be charged with the murder of Vito. He argues that only "innocent" persons killed during the perpetration of a felony were intended by the Legislature to be included in the phrase "a person is killed." From this posture, he asserts that his motion to dismiss should have been granted.

The language of Section 782.04(3) is not ambiguous or vague. It refers to "a person" and must mean "any person." If the Legislature had intended something other than this, it could have inserted the word "innocent."

We are mindful that *State v. Williams*, 254 So.2d 548 (Fla. 2nd DCA 1971), held that under Section 782.04(1), Florida Statutes, the first-degree felony-murder statute, only the death of innocent persons is sufficient to sustain a charge of first-degree felony-murder against a felony perpetrator. The Second District Court stated in that case:

> The test we suggest is predicated upon the obvious ultimate purpose of the felony murder statute itself which is, we think, to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies. [At 550.]

Since we are here concerned with subsection (3) of 782.04, the second-degree felony murder statute, rather than subsection (1), the first-degree felony murder statute, we need not determine whether the reasoning and rationale in *State v. Williams*, supra, is correct. We reserve decision on that point until the question is squarely presented. It is sufficient here to hold that there is nothing in the clear language or history of Section 782.04(3) which limits its application to innocent persons killed by one perpetrating or attempting to perpetrate a felony.

III

In sentencing the appellant to death, the court made the following findings of fact in support of the death penalty:

"The Court having carefully considered and reviewed the plea of Guilty entered by the defendant MARK MIKENAS, in this cause to the charge of Murder in the First Degree, together with the presentence investigation, testimony, evidence and the jury's recommendation of the death penalty in this case, and in consideration thereof makes the following findings of fact:

"*AS TO AGGRAVATING CIRCUMSTANCES:*

"(A) That the defendant, MARK MIKENAS, murdered Anthony Williams while engaged in the commission of a felony, to-wit: robbery.

"(B) That the defendant, MARK MIKENAS, committed the crime of murder while in the perpetration of the crime of robbery for pecuniary gain.

"(C) That the defendant, MARK MIKENAS, had been previously convicted of the offense of robbery in the State of New York for which he was sentenced to a prison term of four (4) years and at the time of the offenses committed in this case he was on parole on the New York sentence and there was outstanding against him a parole violation warrant.

"(D) That the defendant, MARK MIKENAS, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

"(E) That the crime for which the defendant, MARK MIKENAS, is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(F) That the defendant, MARK MIKENAS, has a substantial history of prior criminal activity.

"*AS TO MITIGATING CIRCUMSTANCES:*

"The age of the defendant, MARK MIKENAS, to-wit: age 22 years, would in the Court's opinion be the only mitigating circumstance shown by the defendant, MARK MIKENAS, in this case.



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"IN CONSIDERATION THEREOF, it is the opinion and determination of the Court, and the Court so finds, that the aggravating circumstances far outweigh the mitigating circumstances in this case and, therefore, the jury's recommendation of the death penalty is appropriate in the case of the defendant, MARK MIKENAS, and it is so ordered."

Section 921.141, Florida Statutes, requires the trial judge to logically consider the relationship between aggravating circumstances listed therein and mitigating circumstances and arrive at a sentence based upon reason. In *State v. Dixon*, 283 So.2d 1 (Fla.1973), we said:

> The fourth step required by Florida Statute 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute. [At 8.]

Among those matters listed as mitigating circumstances is subsection (6)(a) of 921.141, which provides: "The defendant has no significant history of prior criminal activity." The Legislature intended absence from the criminal arena to be weighed favorably for a defendant in a capital case. When the trial judge entered under aggravating circumstances: "(F) that the defendant, MARK MIKENAS, has a substantial history of prior criminal activity," he placed into the balance established by the statute, a nonstatutory aggravating factor. The inclusion of this non-statutory aggravating circumstance indicates that the weighing process dictated by statute was not followed. In *Elledge v. State*, 346 So.2d 998 (Fla.1977), we said:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. . . . This result is dictated because, in order to satisfy the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied.) *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

[5, 6] In capital cases, it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the statute. Since mitigating circumstances are present, *Elledge*, supra, dictates resentencing.

We hold that the trial judge did not abuse his discretion in allowing the witness to testify from a wheelchair or in refusing to recuse himself. The second-degree felony murder statute applied to the facts of this case. The trial judge improperly considered a non-statutory aggravating factor. The convictions were proper.

Accordingly, the convictions are affirmed, and the case remanded to the trial court for resentencing without further deliberations by a jury.

It is so ordered.

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ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

ADKINS, J., concurs in part and dissents in part with an opinion.

ADKINS, Justice, concurring in part, dissenting in part.

I concur in that portion of the decision affirming the conviction.

I dissent in the next portion of the decision which sets aside the sentence and refers the case back to the trial judge for further consideration.

The fact that a capital crime was committed in the course of a robbery exemplifies the pecuniary motive at the time of the murder. This constitutes one factor which must be considered in the case. *Provence v. State*, 337 So.2d 783 (Fla.1976). In the *Provence* case, the pecuniary motive at the time of the murder was only one aggravating factor. The sentencing jury had recommended life imprisonment and the subsequent imposition of the death penalty by the trial judge was set aside under the principles announced in *Tedder v. State*, 322 So.2d 908 (Fla.1975).

In *Knight v. State*, 338 So.2d 201 (Fla. 1976), the defendant kidnapped a man and his wife in an effort to extort money as a ransom. The imposition of the death penalty was warranted because the defendant was shown to have murdered two people in the course of the kidnapping and the robbery.

In the case *sub judice*, the trial judge found only one mitigating circumstance, to wit: Defendant was 22 years old at the time the crime was committed. In *Songer v. State*, 322 So.2d 481 (Fla.1975), the fact that defendant was 23 years of age was not a mitigating circumstance. In the *Songer* case, a trooper with the Florida Highway Patrol was shot as he approached the automobile in which defendant was sitting. The defendant had three prior felony convictions and was not so intoxicated at the time of the crime as to be unaware of what he was doing.

In *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), the defendant and his accomplice Ellis robbed a grocery store. As they were making their escape they were stopped by an officer. After being stopped, either defendant or his accomplice walked to the officer's patrol car and fired two shots into his head. He was killed instantly. In *Cooper*, the defendant was previously convicted of armed robbery; the murder of the police officer was committed while the defendant was in the perpetration of a robbery and in flight after committing the robbery; the murder was committed for the purpose of avoiding or preventing the lawful arrest of the defendant; and there were no mitigating circumstances. The sentence of death in *Cooper* upon conviction of first degree murder was held to be warranted.

In the case *sub judice*, the homicide was committed while the defendant was engaged in or escaping from the commission of a robbery. The defendant was previously convicted of the offense of robbery. The defendant knowingly created great risk of death to many persons. *See Alvord v. State*, 322 So.2d 533 (Fla.1975). Also, the felony was committed for the purpose of avoiding or preventing a lawful arrest or for the purpose of effecting an escape from custody. Defendant admitted upon cross-examination that he had been convicted of a crime "six or seven" times.

Appellant says that in considering the aggravating factors listed in Section 921.-141, Florida Statutes (1975), the trial judge considered prior criminal activity when, in fact, the history of prior criminal activity should be considered only as a mitigating circumstance. Section 921.141(6)(a), Florida Statutes (1975). It is utterly illogical to say that the absence of a past history of criminal activity is a mitigating circumstance, but that the existence of such a past is not a relevant factor to be considered. In *Knight v. State, supra*, the trial judge listed as a finding under mitigating circumstances that "the defendant has a history of prior criminal activity," 338 So.2d at 202. To say that the prior criminal activity must be listed under mitigating circumstances rath-

er than aggravating circumstances is merely placing form over substance. In *State v. Dixon*, 283 So.2d 1 (Fla.1973), we said:

"The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

• • • • • •

"As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance." At 8–9.

The fundamental purpose of the written findings is to guarantee the imposition of the death penalty becomes a matter of reasoned judgment rather than unbridled discretion. There is no requirement these findings of fact be in any particular form, as long as it appears the trial judge viewed the issue of life or death within the framework of the rules provided by statute.

Section 921.141(1), Florida Statutes (1975), in prescribing the manner in which the sentencing procedure should be conducted, provides in part:

"In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida."

In *Alvord v. State, supra*, the Court allowed in evidence proof of the commission of a crime of which the appellant had previously been found not guilty by reason of insanity. This Court said:

"In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. In fact, one of the statutory mitigating circumstances is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Fla.Stat. § 921.141(6)(f), F.S.A. There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence. *State v. Dixon, supra.* *See* also *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), and *Smith v. State*, 303 So.2d 694 (Fla. 1st DCA 1974). This testimony was properly allowed into evidence." 322 So.2d at 538–39.

In *Dobbert v. State*, 328 So.2d 433 (Fla. 1976), the defendant was convicted of first degree murder, the victim being his child. Evidence of prior offenses and evidence of beatings which were never prosecuted were allowed in the evidence in determining the penalty. This Court affirmed the death penalty.

The majority holds that the trial judge may have improperly considered as one of the aggravating circumstances the fact that the defendant had "a substantial history of prior criminal activity." The defendant admitted that he had been convicted of a crime "six or seven" times. The majority holds that the trial judge properly con-

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sidered the prior convictions as set forth in the sentencing order, but improperly considered the "prior criminal activity" of the defendant. The question arises as to how you could consider prior convictions, without at the same time considering criminal activity. However, if the trial judge should consider prior criminal activity as being a part of the aggravating circumstances of prior convictions, then the matter must be returned to the trial judge for reconsideration and resentencing. This form of logic speaks for itself.

The sentence of death was properly imposed as a result of the reasoned judgment and not by counting and subtracting different factors.

**CASTLEWOOD INTERNATIONAL CORPORATION, etc., Appellant,**

**v.**

**William SIMON et al., Appellees.**

**No. 53146.**

**Supreme Court of Florida.**

**Jan. 11, 1979.**

**Rehearing Denied March 12, 1979.**

The Fifth Circuit Court of Appeals certified a question asking for an interpretation of the financial restrictions imposed by Florida law on transactions between wholesalers and retailers of alcoholic beverages. The Supreme Court, England, C. J., held that a wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in cost or the savings attributable to quantity sales.

Question answered.

Adkins, J., concurred in result only.

**Intoxicating Liquors ⇐124**

Wholesaler may sell to retailer on basis of discount given at time of sale and made available to all vendors buying similar quantities, regardless of laid-in cost or savings attributable to quantity sales. West's F.S.A. § 561.01(10, 13).

---

Tobias Simon, Jennifer Hurst and Theodore L. Tripp, Jr. of the Law Offices of Tobias Simon, Miami, for appellant.

J. B. Eskenazi, U. S. Atty. and Lloyd G. Bates, Asst. U. S. Atty., Miami, and Ronald E. Williams, Office of Chief Counsel, Bureau of Alcohol, Tobacco and Firearms, Washington, D. C., for appellees.

Cynthia S. Tunnicliff of Spector & Tunnicliff, Tallahassee, for Distilled Spirits Wholesalers of Florida, Inc., amicus curiae.

Wilbur E. Brewton and J. Riley Davis of Taylor, Brion, Buker & Greene, Tallahassee, for Wine Industry of Florida, Inc., amicus curiae.

ENGLAND, Chief Justice.

This case comes to us by certification from the Fifth Circuit Court of Appeals, asking for an interpretation of the financial restrictions imposed by Florida law on transactions between wholesalers and retailers of alcoholic beverages. Critical to our answer are the history of Florida's regulatory provisions on the subject and a comparison with comparable features of the federal regulatory scheme.

Pursuant to the authority reserved to the several states by the twenty-first amendment to the United States Constitution,[1] Florida has adopted a comprehensive regulatory scheme to control the distribution and sale of intoxicating liquors within this

1. U.S.Const. amend. XXI, § 2 provides: "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

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Section 921.141, Florida Statutes (1975)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES. Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Case No. 81-6419

RECEIVED
MAR 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

---

MARK MIKENAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

Petitioner, MARK MIKENAS, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C. McLain
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COUNSEL FOR PETITIONER

CASE NO. 81-6419

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---

MARK MIKENAS,

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vs.

STATE OF FLORIDA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF
PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, MARK MIKENAS, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on July 1, 1976, in the Circuit Court for Hillsborough County, Florida, for first degree murder, and second degree murder.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed all of my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

MARK MIKENAS-PETITIONER

Subscribed and sworn to before me, a Notary Public, this 11 day of February, 1982.

Notary Public

My Commission Expires:

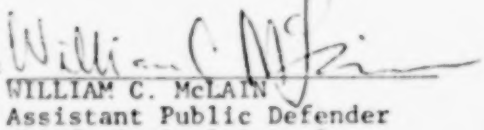
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 11, 1983

WCM:rkm

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for MARK MIKENAS, the Petitioner, hereby certify that on March 17, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis with attached Affidavit on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Robert Landry, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No. 81-6419

IN THE

SUPREME COURT OF THE UNITED STATES

**ORIGINAL**

RECEIVED
MAY 10 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MARK MIKENAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General

and

ROBERT J. LANDRY
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COUNSELS FOR RESPONDENT

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| Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980) | 3 |
| Lamadline v. State, 303 So.2d 17 (Fla. 1974) | 4 |
| Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 | 3 |
| Maggard v. State, 399 So.2d 973 (Fla. 1981) | 4 |
| Martin v. Louisiana, 449 U.S. 998, 66 L.Ed.2d 197 | 5 |
| Mikenas v. State, 367 So.2d 606 (Fla. 1979) | 2 |
| Mikenas v. State, 407 So.2d 892 (Fla. 1982) | 1 |
| State v. Dixon, 238 So.2d 1 (Fla. 1973) | 4 |
| State v. Shaw, 255 Se.2d 799 (S.C. 1979) cert. denied 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979) | 3 |
| Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179 (1973) | 4 |
| Westbrook v. Balkcom, 449 U.S. 999, 66 L.Ed.2d 298 | 5 |

## OPINION BELOW

The Opinion of the Florida Supreme Court sought to be reviewed is reported as Mikenas v. State, 407 So.2d 892 (Fla. 1982)

## STATEMENT OF THE CASE AND FACTS

On November 3, 1975, the appellant, Mark Mikenas, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida. During the robbery the appellant carried a .38 caliber revolver. There were no customers in the store during the robbery. Upon entering the store, the appellant and his co-felons forced the lone store clerk into a back room of the building. Unknown to the robbers, Gary Baker, an auxiliary deputy sheriff, observed the robbery from a hidden position in the store. When an automobile unexpectedly arrived at the front of the store, appellant and his co-felons tried to exit the store through a back door. Baker, with drawn pistol, stopped them and placed them under arrest.

Seconds later, Anthony Williams, an off-duty Tampa policeman in civilian attire, came into the store through the front door. Baker called to Williams for help and informed him that a robbery was underway. Immediately thereafter, appellant and Baker fired at each other with both missing. Baker later killed Vito and wounded the appellant as they ran towards the front of the store. As appellant was falling to the floor, he shot and killed Anthony Williams, the Tampa police officer. Ann Williams, the wife of Anthony Williams, herself a police officer in uniform, arrested appellant. Baker arrested Rinaldi.

The indictment charged the appellant and Rinaldi, in two counts, with first-degree murder of Anthony Williams and with second-degree murder of Vito Mikenas who "was killed by a person or persons other than the person or persons engaged in the perpetration or attmept to perpetrate said robbery..."

The appellant pleaded guilty to murder in the first-degree for the death of Anthony Williams and pleaded nolo contendere to the charge of second-degree murder of his brother, Vito. Appellant reserved the right to appeal the applicability of Section 782.04(3), Florida Statutes (1975), the second-degree felony murder statute, to the facts of this case. The judge adjudged appellant guilty, and jury selected for the sole purpose of recommending sentence, rendered a recommendation of death. The judge sentenced appellant to death.

The Florida Supreme Court affirmed petitioner's conviction but remanded for resentencing, without further jury de.iberations, ecause the trial judge considered a nonstatutory aggravating factor. Mikenas v. State, 367 So.2d 606 (Fla. 1979) Petitioner was again sentenced to death and he appealed alleging a new jury should have been impanelled. Both the judgment and sentence were affirmed. Mikenas v. State, 407 So.2d 892 (Fla. 1982)

This petition follows.

## ARGUMENT

### REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because no substantial federal constitutional question is presented.

First of all, it must be noted that, as the Florida Supreme Court held, no improper evidence was submitted to the jury, 407 So.2d 892, at 893. The defect found in the first appeal requiring a remand was the trial judge's erroneously placing on the weighing scale as an aggravating factor the defendant's substantial history or prior criminal activity. 367 So.2d 606, at 609-610; 407 So.2d 892, at 893. The information itself was not nonstatutory or unconstitutional. Florida Statute 921.141(i) (1975) provides:

> "In the proceeding, evidence may be presented as to any matter that the Court deams relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated...."

A consideration of the character of the accused, good or bad, presumably is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978)[1]

Any alalogy to Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980) must fail. There the death penalty rested on a single aggravating factor which this Court found to have been to broadly defined to pass constitutional muster. In the instant case the sentencing trial judge found multiple statutory aggravating factors and a single possible mitigating factor. 407 So.2d 892, at 893.[2]

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1/ Even nonstatutory factors relevant to the character of the accused may be considered by the sentencer. State v. Shaw, 255 Se.2d 799 (S.C. 1979) cert. denied 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979)

2 Cf. Armstrong v. State, 399 So.2d 953 (Fla. 1981) holding that a possible mitigating factor is not a sufficient finding of the presence of that factor.

Even assuming arguendo an improper aggravating circumstance was considered, the Florida Supreme Court has held death is appropriate where there are other good aggravating circumstances. See Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

Petitioner argues that the jury improperly considered such matters as aggravating factors. In Florida, it is the trial judge who imposes sentence; the jury only recommends. State v. Dixon, 283 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974) In addition, the jury did not consider as an aggravating factor petitioner's prior history of criminal activity. A review of the jury instructions showing that they were informed that the aggravating factors to be considered were limited to the eight statotory aggravating factors. (R492-494). We do not presume the jury violated their oath to consider the case without obeying the trial court's instruction on the law.

Mikenas then attempts to have this Court act as a supplemental reviewer of state law questions by suggesting that the Florida Supreme Court misapplied Maggard v. State, 399 So.2d 973 (Fla. 1981). In reply, respondent answers that questions of state law are resolved by state courts. Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179 (1973) And Maggard, supra., is inapplicable. That case stands for the proposition that where a defendant stipulates that a certain mitigating factor is specifically waived and will not be asserted the state may not introduce rebuttal evidence to show the absence of that mitigating factor. In the instant case, trial defense counsel did not specifically stipulate that he would waive the applicability of mitigating circumstance 6(a) of F.S. 921.141. Without such a stipulation the state may offer evidence to rebut the presence of a potential mitigating factor, especially where such evidence is highly relevant to the character of the accused.

The evidence pertaining to petitioner's prior history of criminal activity was properly admissible because relevant to Mr. Mikenas's character and tending to rebut potential statutory

mitigating factor 921.141(6)(a). The trial court did not err in the weighing process following the remand from the Florida Supreme Court.[3]

## CONCLUSION

The Petition for Writ of Certiorari should be denied for the failure to demonstrate the existence of a substantial federal constitutional question.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William C. McClain, Esq. 495 N. Carpenter Street, Bartow, Florida on this 6th day of May, 1982.

Of Counsel for Respondent

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3 Even if the sentencing judge did commit an error in the calculas, where, as here, the appellate court can determine that such error is insignificant affirmance of the death sentence would be appropriate. Brown v. State, supra. See also Westbrook v. Balkcom, 449 U.S. 999, 66 L.Ed.2d 298; Drake v. Zant, 449 U.S. 999, 66 L.Ed. 297; Martin v. Louisiana, 449 U.S. 998, 66 L.Ed.2d 297.